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15 WATER AGENCY

11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13

14 SANTA CLARITA VALLEY WATER  
15 AGENCY,

16 Plaintiff,

17 vs.

18 WHITTAKER CORPORATION and  
19 DOES 1-10, Inclusive,

20 Defendant.

21 AND RELATED CASES  
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Case No: 2:18-cv-6825 SB (RAOx)

*Assigned to Hon. Stanley Blumenfeld,  
Jr.*

**PLAINTIFF'S MOTION IN LIMINE  
NO. 2 TO EXCLUDE DAUS  
OPINIONS 1, 4 AND 5**

Date Action Filed:  
Trial Date: August 24, 2021

**I. INTRODUCTION.**

Mr. Daus' expert report suggests that the VOC contamination from the Whittaker Bermite site is contained and is no longer threat to Plaintiff's Water Supply wells. His report, however, is irrelevant because it fails to address the obvious fact that Whittaker released massive quantities of VOCs to the soil and groundwater that significant amounts of VOCs<sup>1</sup> have already left the site and Whittaker has not characterized the offsite groundwater plume and should be excluded under FRE 402. His opinion is also irrelevant because DTSC has not determined that Whittaker's groundwater remedy is complete and likely will not be able to do so for several decades. In addition, Mr. Daus' methodology for determining that VOC contamination no longer flows off site toward Plaintiff's water production wells because he sheepishly admits that he did omitted groundwater extraction from his groundwater flow model - an essential element in groundwater flow dynamics. Finally, Mr. Daus' opinion that onsite groundwater extraction remedy contains contamination from leaving the site depends on his flawed groundwater flow methodology and should also be excluded based on his failure to consider that offsite groundwater extraction wells draw VOC contamination away from the site.

Mr. Daus' opinion first opinion is (1) flawed because Mr. Daus does not provide a professional standard for "satisfaction" and (2) not reflective of Whittaker's entire history (from its 1987 site closure) with DTSC which elongated a cleanup that should have taken a few years has been to over 30 years because of Whittaker's failure to comply with DTSC directives. During the decades that

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<sup>1</sup> According to Whittaker consultant CDM Smith, at least 263,000 pounds of VOCs were found in the soil at the site. Gee Decl. ISO Mtns. Ex. C at 21-22 (Stanin Expert Report). The massive releases also impacted groundwater, though DTSC has not required Whittaker to estimate the volume of VOCs released to the groundwater.

Whittaker resisted DTSC directives, contamination from the site continued to spread to offsite wells. In addition, DTSC site mitigation managers that oversaw the activities at Whittaker will provide testimony, so any testimony by Mr. Daus regarding DTSC's oversight of the Whittaker site would be excessively cumulative and less reliable than DTSC percipient witness testimony regarding the same subject matter.

Mr. Daus' opinions 4 and 5 suffer the same methodology flaws as Mr. Hokkanen's opinion 4 because Mr. Daus' groundwater flow opinion fails to consider the impact of groundwater pumping which he admits should have been considered, resulting a contrary groundwater flow conclusion that is inconsistent with Whittaker's own consultants, including GSI, the firm that employs Mr. Daus. The following Daus opinions should be excluded:

***Opinion 1:*** The Site investigation and remedial measures implemented by Whittaker have been performed under the direct supervision of the DTSC and to the DTSC's satisfaction.

***Opinion 4:*** The VOC plume in OU-3 and OU-4 has been sufficiently delineated to implement the approved groundwater remedy.

***Opinion 5:*** The groundwater extraction system is providing containment of the VOC plume in S-IIIa in OU-3 and OU-4.

## II. STANDARDS FOR EXCLUSION OF EXPERT TESTIMONY

*As set forth in the FRE 702 Advisory notes, the 2000 Amendment "affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Among the factors that, the courts consider are:*

- "Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition), and
- "Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho*

1 *Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (*Daubert* requires  
2 the trial court to assure itself that the expert “employs in the courtroom  
3 the same level of intellectual rigor that characterizes the practice of an  
4 expert in the relevant field”).”

- 5 • In addition, Mr. Daus’ testimony regarding the satisfaction of DTSC with  
6 Whittaker’s actions is opinion testimony that is better provided by DTSC.  
7 The project managers for DTSC will be trial witnesses. *See United States*  
8 *v. Fletcher* 47 F.3d 1176(9<sup>th</sup> Cir 1995, as amended on denial of rehearing  
9 (July 13, 1995).

### 10 **III. ANALYSIS**

#### 11 **A. Mr. Daus’ Opinion Regarding DTSC’s Satisfaction with** 12 **Whittaker’s efforts is incomplete and misleading**

##### 13 **1. Mr. Daus does not work for DTSC and his testimony will be** 14 **cumulative with DTSC witnesses that are designated to** 15 **testify on its oversight of Whittaker’s cleanup activities.**

16 Mr. Daus does not articulate a professional standard for “DTSC  
17 Satisfaction” nor does he have any work experience related to “DTSC Satisfaction”  
18 – he does not and has not worked for DTSC. *See Daubert v. Merrell Dow*  
19 *Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9<sup>th</sup> Cir. 1995)(The court should  
20 consider whether experts are “proposing to testify about matters growing naturally  
21 and directly out of research they have conducted independent of the litigation, or  
22 whether they have developed their opinions expressly for purposes of testifying).  
23 In addition, Mr. Daus suggests that DTSC is satisfied with Whittaker’s soil cleanup  
24 activities because DTSC deemed Whittaker’s soil remediation activities as  
25 complete. DTSC has not deemed the groundwater cleanup beneath the Whittaker  
26 site or offsite groundwater near the Whittaker site to be complete.

27 In addition, Mr. Daus’ Opinion 1 testimony should be excluded because it is  
28 unduly cumulative of deposition testimony provided by DTSC’s Jose Diaz (DTSC  
Project Manager for the Whittaker site) and Hassan Amini (Whittaker’s project  
manager and Daus’ colleague). *See United States v. Fletcher* 47 F.3d 1176 (9<sup>th</sup> Cir  
1995, as amended on denial of rehearing (July 13, 1995)(Expert witness testimony  
by Altona would have been cumulative because AmTel’s own attorney . . . testified

1 at length regarding AmTel's attempt to comply with California telemarketing  
2 registration statutes).

3                   **2. Mr. Daus did not consider the impact of Whittaker's refusal**  
4                   **to comply with DTSC orders and directives on the spread of**  
5                   **Groundwater Contamination.**

6           Had Whittaker complied with DTSC directives at the time it shut down in  
7 1987 (Gee Decl. ISO Mtns. Ex. D at 3.2 (Daus Expert Report)), the necessary  
8 cleanup equipment could have installed within 6 years (according to Whittaker's  
9 2004 public participation plan, the completion of work was anticipated to take  
10 approximately six years; see table 1 of  
11 [https://www.envirostor.dtsc.ca.gov/public/deliverable\\_documents/6284116983/Wh](https://www.envirostor.dtsc.ca.gov/public/deliverable_documents/6284116983/Whittaker%20Public%20Participation%20Plan.pdf)  
12 [ittaker%20Public%20Participation%20Plan.pdf](https://www.envirostor.dtsc.ca.gov/public/deliverable_documents/6284116983/Whittaker%20Public%20Participation%20Plan.pdf)). Groundwater extraction at the  
13 site would have commenced in 1993, some 25 years before the 2018 start date  
14 reported by Mr. Daus in his first opinion. Groundwater cleanups are often  
15 estimated to take approximately 30 years to complete and would be nearly  
16 completed by now had Whittaker commenced cleanup activities at the time of  
17 plant closure. Instead, despite warnings from its environmental consultant,  
18 Whittaker chose to simply "remove the main large material and drums... and then  
19 fill those holes back in and leave the landfill as is." See Gee Decl. ISO Mtns. Ex.  
20 S (Thompson Memo). Whittaker's plan to hide contamination allowed  
21 groundwater contamination to spread to impact multiple SCV Water wells.

22           Ultimately, DTSC commenced a criminal investigation against Whittaker for  
23 its clandestine disposal activities. See Gee Decl. ISO Mtns. Ex. W (Long Letter).  
24 Mr. Daus should have known of the criminal investigation because his long-time  
25 colleague, Hassan Amini was cited prominently in DTSC's request to the  
26 California Attorney General assistance to prosecute Whittaker for its unlawful  
27 disposal practices. Gee Decl. ISO Mtns. Ex. K at 232:8-233:24 (Daus Depo.  
28 Excerpts). Mr. Amini was previously employed by a developer to evaluate the  
Whittaker site. He provided testimony that Whittaker's Vice President became

1 angry with him when he disclosed that a site buried by Whittaker's consultants was  
2 a large RCRA unit. See Gee Decl. ISO Mtns. Ex. W at 12 (Long Letter).

3 **B. Daus' Opinion 4 regarding OU-3 and OU-4 delineation is also**  
4 **flawed because he does not explain the contrary evidence by**  
5 **Whittaker's own consultants and omits the influence of**  
6 **groundwater pumping in his analysis.**

7 Mr. Daus' opinion 4 is based on the same unreliable "Hokkanen Maginot  
8 wall" theory that VOCs do not leave the site because three monitoring wells on the  
9 western boundary of the site have infrequent VOC detections. See Hokkanen  
10 Daubert motion for Opinion 4.<sup>2</sup> However, unlike Mr. Hokkanen who turns a blind  
11 eye toward Whittaker's own consultant analysis, Mr. Daus methodology to  
12 determine groundwater flow is flawed by his own admission.

13 Mr. Daus' conclusions regarding flow through the Hokkanen Maginot wall  
14 is flawed because he failed to consider the impact of the operation of SCV Water  
15 groundwater production wells on groundwater flow from the Whittaker site, which  
16 he admitted influences groundwater flow direction:

17 Q: Okay. And so in your opinion, how do hydrogeologists go about  
18 determining groundwater flow direction?

19 A: I think we use groundwater elevation data, and we may tie that into  
20 surface water elevation data, and other surface water data. So they're -  
21 - they're connected. Surface water and groundwater are often  
22 connected. So we look at the -- at the -- at the body of information  
23 regarding groundwater elevation and surface water elevation.

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24 <sup>2</sup> Like Mr. Hokkanen, Mr. Daus' flow diagrams conflicted with Whittaker's  
25 consultant, AECOM. When asked about the AECOM flow diagram, Mr. Daus  
26 indicated that he considered the diagrams, but could not explain the conflict  
27 between AECOM and his analysis. Mr. Daus' flow diagrams also contradict that of  
28 his GSI colleagues, Mr. Hassan Amini and Dr. Panday Sorab, who in February 26,  
2019 made a PowerPoint presentation to SCV Water that shows groundwater flow  
in the directions north and south of the Hokkanen Maginot wall. See Gee Decl.  
ISO Mtns. Ex. X at 12, 15 (Powerpoint Presentation). This presentation was made  
by, among others, Mr. Hassan Amini and Dr. Panday Sorab, colleagues of Mr.  
Daus at GSI. See email invitation to SCV Water and its consultants attached as  
Gee Decl. ISO Mtns. Ex. Y (Email re Presentation).



1 Q Okay. And when you're saying surface elevation and groundwater  
2 elevation, you're talking about potential groundwater flow absent the  
influence of groundwater pumps?

3 A I think you have to look at those things. You have to look at  
4 anything that would influence the flow, whether it's a -- whether it's a  
5 recharge source, for example, if it's a lake or a river or a discharge  
6 point. If it were also a river or a groundwater pumping well or any one  
7 of a number of things, a swamp, so you have to look at the -- kind of  
8 the full picture of information and consider geologic information. For  
9 example, you might have to consider faults or mountain ranges as you  
can imagine or different water sheds. You really want to be kind of  
broad in your consideration of information.

10 Gee Decl. ISO Mtns. Ex. K at 32:4-33:7 (Daus Depo. Excerpts).

11 However, in order to opine that groundwater would not flow from the Whittaker  
12 site toward the Saugus 1 and 2 wells, Mr. Daus only considered groundwater  
13 elevation and not groundwater well pumping influences:

14 Q Let me ask a simple question. Did you consider Saugus-1 and  
15 Saugus-2 operational when you conducted your evaluation?

16 A Well, I knew Saugus-1 and 2 were out on -- you know, to the north  
17 and to the east -- or west of the site, but my evaluation was of the data  
that shows containment -- or of the groundwater elevation data, and  
that's what I considered.

18 Q Okay. So the answer is the influences from the Saugus-1 and  
19 Saugus-2 operation was not considered in your report?

20 A Whatever was happening at the site, whatever has been going on at  
21 the site, under this containment system that they have operating at the  
site is what I considered. . .

22 Q Okay. So my question is . . . that you did for your containment  
23 evaluation, the base conditions involved Saugus-1 and Saugus-2  
operating?

24 A No.

Gee Decl. ISO Mtns. Ex. K at 123:8-124:6 (Daus Depo. Excerpts).

25 Thus, Mr. Daus' opinion regarding that the groundwater in areas OU-3 and OU-4  
26 is sufficiently delineated is unreliable because Mr. Daus did not consider the  
27 potentially significant influence of groundwater pumping.  
28

1           **C.     Mr. Daus' Conclusion that the groundwater remedy is providing**  
2           **VOC "containment" is also flawed.**

3           Mr. Daus' opinion 5 that VOC contamination is being contained on the  
4           Whittaker site relies on his opinion that in the groundwater does not flow from the  
5           Whittaker site toward Saugus 1 and 2 as discussed in Part III.B above For this  
6           reason alone, Mr. Daus' Opinion 5 that the VOC contamination on the Whittaker  
7           site is contained by the extraction wells on the Whittaker site is unreliable.

8           In addition to Mr. Daus' groundwater pumping omission, his analysis is  
9           inconsistent with information presented by Mr. Amini and Dr. Panday Sorab in  
10          their Model Update presentation. Mr. Daus praised Dr. Sorab who works for GSI  
11          -- the same company that employs Mr. Daus.

12          Q Okay. And do you know . . . if Dr. Panday is . . . reliable? -- if Dr.  
13          Panday oversees a  
14          hydrogeological containment model, would you believe that his work  
15          would be credible?

16          A I would view Dr. Panday's work as credible. . . Sorab is actually in  
17          the National Academy of Engineers for his modeling, and that's a very  
18          rare breed.

19          Q Okay. So does that mean his modeling -- his modeling efforts  
20          would have a lot of credibility?

21          A: He has a lot of credibility about groundwater models -- regarding  
22          groundwater models.

23          In the Model Update, discussed above, Mr. Amini and Dr. Sorab presented a  
24          particle tracking model that contradicts Mr. Daus' opinion because it shows that  
25          the extraction wells do not reach the most heavily contaminated groundwater in the  
26          southwest corner of the Whittaker site. Gee Decl. ISO Mtns. Ex. X at 53  
27          (Powerpoint Presentation). The groundwater concentrations along the western  
28          boundary of the lower portion of the Whittaker site has some of the highest  
29          concentrations of TCE contamination at the Whittaker site. See Gee Decl. ISO  
30          Mtns. Ex. C at 31 (Stanin Expert Report).



**IV. CONCLUSION**

Based on the above, Mr. Daus' Opinion 1 should be excluded because it is omits much of Whittaker's strained history with DTSC and is unduly cumulative of testimony provided by DTSC of its oversight of the Whittaker site. Mr. Daus' fourth and fifth opinions should be excluded because he does not consider groundwater pumping influences in his groundwater flow analysis – influences that he acknowledges should be considered. The fourth and fifth opinions are also contradicted by the work overseen by Mr. Daus' GSI colleagues, Mr. Hassan Amini and Dr. Sorab. Mr. Daus endorsed Dr. Sorab as a credible groundwater modeler because he is a member of the National Academy of Engineers for his modeling expertise,

Date: July 13, 2021

NOSSAMAN LLP

By: /s/ Byron Gee

Byron Gee  
Attorneys for Plaintiff SANTA  
CLARITA VALLEY WATER  
AGENCY

**WHITTAKER'S OPPOSITION TO SCVWA'S MIL #2 (DAUS)**

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1       **I. THE STANDARD FOR ADMITTING EXPERT TESTIMONY**

2       Plaintiff incorrectly seeks to exclude the opinions of Whittaker’s expert Mr.  
3       Daus under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and  
4       Federal Rules of Evidence, Rule 702 by claiming these opinions employ flawed  
5       methodology and are not the product of reliable principles and methods. This  
6       argument crumbles when the basis for each of the opinions challenged by Plaintiff  
7       are examined.

8       That Plaintiff disagrees with the opinions of Whittaker’s experts is not a  
9       proper basis for their exclusion. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230  
10      (9th Cir. 1998), *cert. den.* 526 U.S. 1099 (stating that a court “should not exclude  
11      expert testimony simply because it disagrees with the conclusions of an expert”  
12      and “[t]he [*Daubert*] test is whether or not the reasoning is scientific and will assist  
13      [the trier of fact].”

14      Even assuming for the sake of argument that some of these expert opinions  
15      put forth by Mr. Daus are flawed in methodology (and Whittaker in no way  
16      concedes this point), “[d]isputes as to the strength of [an expert’s] credentials,  
17      faults in his use of [a particular] methodology, or lack of textual authority for his  
18      opinion, go to the weight, not the admissibility, of his testimony.” *Id.* (quoting  
19      *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.1995)).

20      In determining whether an expert’s testimony is reliable and based upon the  
21      scientific method the Ninth Circuit in *Edwin Hardeman v Monsanto Company*, 997  
22      F.3d 941, 960 (9th Cir. May 14, 2021) held: “[w]hen determining reliability, district  
23      court judges can consider the following non-exclusive factors: (1) “whether the  
24      theory or technique employed by the expert is generally accepted in the scientific  
25      community;” (2) “whether it’s been subjected to peer review and publication;” (3)  
26      “whether it can be and has been tested;” and (4) “whether the known or potential  
27      rate of error is acceptable.” *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311,  
28      1316 (9th Cir. 1995) (citing *Daubert*, 509 U.S. at 593– 95). “Th[is] inquiry is

1 ‘flexible,’” *Wendell*, 858 F.3d at 1232 (quoting *Daubert*, 509 U.S. at 594), and  
2 “should be applied with a ‘liberal thrust favoring admission,” *Messick v. Novartis*  
3 *Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (quoting *Daubert*, 509 U.S. at  
4 588, 113 S.Ct.2786).” “Scientific evidence is reliable when “the principles and  
5 methodology used by an expert are grounded in the methods of science.” *Clausen*  
6 *v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003).” *Hardeman, supra*, 997  
7 F.3d 941 at 960.

8 Testimony given by Mr. Daus in this case meets all of these factors, cited  
9 both in the 2000 Advisory Notes to Federal Rule of Evidence 702 and by the Ninth  
10 Circuit in its *Hardeman*. Furthermore, the principals and methods relied upon by  
11 Mr. Daus are well grounded in science and widely accepted and applied by experts  
12 in the field. That Plaintiff may disagree with the methodology used by or the  
13 conclusions reached by Mr. Daus is not a basis to exclude the opinions offered.  
14 See, *Kennedy v. Collagen Corp.*, 161 F.3d 1226 at 1230.

15 In removing any lingering doubt about the admissibility of reliable expert  
16 testimony the *Hardeman* Court made it clear that: “[T]he interests of justice favor  
17 leaving difficult issues in the hands of the jury and relying on the safeguards of the  
18 adversary system . . . to ‘attack[] shaky but admissible evidence.’” *Wendell*, 858  
19 F.3d at 1237 (quoting *Daubert*, 509 U.S. at 596) (alteration in original). The  
20 Supreme Court has not directed courts to follow a different rule since it first  
21 decided *Daubert* almost 28 years ago.” *Hardeman* at 962.

22 Here, the reasoning and methodology of Whittaker’s expert Mr. Daus is  
23 based on hard science and will assist the Court and the jury in determining the  
24 central issues in this case.

## 25 **II. ARGUMENT**

26 That SCVWA disagrees with the opinions of Whittaker’s expert is not a  
27 proper basis for the Court to exclude them under *Daubert*. Here, the reasoning and  
28 methodology of Mr. Daus is based on hard science, data and a methodology widely

published in text books and accepted in the field of Hydrology. The opinions of Mr. Daus will assist the Court and the jury in determining the central issues in this case. In challenging Opinions 4 and 5, SCVWA asserts, incorrectly, that the methodology employed by Mr. Daus did not consider the impact of groundwater being pumped by SCVWA's groundwater production wells. SCVWA is wrong.

By relying on groundwater data, Mr. Daus took into account anything that would have an influence on the groundwater. This includes the pumping of the wells. Groundwater levels measured at the Site will capture the influence of all pumping on the groundwater flow system, whether from on-Site or off-Site extraction wells. Since drawdown is cumulative, any drawdown in groundwater elevations that is generated by pumping at Saugus 1 and Saugus 2 or any other off-Site well and extends far enough away from the pumping well is included in the measured water levels in monitoring wells. Daus Dcl. ¶2.

**A. THE BASIS FOR DAUS OPINION NO. 1 MEETS THE STANDARDS FOR ADMISSIBILITY**

Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. 2000 Amendments to FRE 702. Mr. Daus has been a practicing Hydrologist for 35 years, during which time he has interfaced with DTSC or its predecessor regulatory agency, the Department of Health Services (DHS), on numerous soil and groundwater cleanup projects in Southern California. In these decades of experience, concurrence from DTSC that an approved remedial action plan or RAP is ordered to be implemented is proof that DTSC is satisfied with the RAP and that the work has been completed. Daus Dcl. ¶1.

In Opinion 1 Mr. Daus opines: "Since Site investigation and remediation activities began in the early 1980's, the DTSC has provided extensive oversight of the planned and completed response actions. The DTSC frequently provided substantive comments to ensure Whittaker's response actions met the DTSC's requirements. In addition, the DTSC has continually provided approval for

1 completed actions or required additional actions to meet its approval throughout  
2 this extensive investigation and cleanup program.” Hagstrom Dcl. ¶1.

3 Practical experience and extensive training provide the necessary basis for  
4 Mr. Daus to understand whether DTSC was and is “satisfied” with the progress  
5 made in remediating the soil and groundwater at the Whittaker property. *Kumho*  
6 *Tire Co. v. Carmichael*, 119 S. Ct.1167 1178 (1999) (stating that “no one denies  
7 that an expert might draw a conclusion from a set of observations based upon  
8 extensive and specialized experience.”). Soil remediation at the Whittaker property  
9 has been completed.

10 DTSC issued closure letters confirming soil remediation activities at the  
11 Whittaker property were completed to DTSC’s exacting standards. Hagstrom Dcl.  
12 ¶¶ 2 and 3. DTSC does not issue such letters lightly. Before issuing a closure  
13 letter, like that issued to Whittaker, DTSC undertakes an exhaustive evaluation of  
14 the work performed to determine that the media at issue does not pose a future risk  
15 to human health and the environment. The receipt of a closure letter is *prima facie*  
16 evidence that DTSC is “satisfied” with the work done by the responsible party, in  
17 this case Whittaker.

18 DTSC approved the groundwater Remedial Action Plan (“RAP”), which has  
19 been effectuated and operated under DTSC oversight. If DTSC was not “satisfied”  
20 with Whittaker’s groundwater remediation system it would not have approved the  
21 RAP and if it was not satisfied with its operation DTSC would ordered changes to  
22 the RAP, which it has not.

23 The presence of VOC’s within the property boundaries does not, without  
24 more, equate to the migration of VOCs outside of and off the property. SCVWA  
25 may disagree with that, but mere disagreement is not a basis to exclude Mr. Daus’  
26 opinion that VOC’s have not left the Whittaker property. Mr. Daus’ expert  
27 testimony takes into consideration critical factors, such as the timing of a release,  
28 the volume of a release, where the releases concentrated in a single area, the



1 adsorption and retardation factors of the soil, the location of aquitards beneath the  
2 release areas, off-gassing of the VOCs, the removal and excavation of the source or  
3 sources of the VOCs, the effectiveness and rate of extraction of a soil vapor  
4 extraction system as well as the depth and spacing of the extraction arrays **and the**  
5 **pumping of SCVWA's groundwater production wells on groundwater flow.**

6 These are the factors experts in the hydrology field rely upon in evaluating  
7 the effectiveness of a remediation system. Mr. Daus has, following a widely used  
8 and well accepted methodology, compiled and condensed this technical  
9 information into a coherent narrative that he will explain to the finder of fact, in a  
10 concise and comprehensible manner.

11 Mr. Daus did what scientists and experts do – he considered the data,  
12 assessed the possible outcomes, reached a conclusion based on the data and  
13 formulated an opinion in other words he applied the scientific method. He did not,  
14 as SCVWA's argument does, rely upon speculation as to what might have  
15 happened had equipment been installed in the 1990s and unsubstantiated  
16 allegations of the temperament of a former Whittaker executive.<sup>3</sup>

17 SCVWA criticism that Mr. Daus did not take into account a criminal  
18 investigation in which no charges were brought is nonsensical. Whether a criminal  
19 investigation was commenced into Whittaker's disposal practices 40 plus years  
20 ago, and the date when Whittaker reached agreement with DTSC to initiate a  
21 groundwater capture and treatment program is nothing more than SCVWA's  
22 attempt to portray Whittaker as a bad actor, even assuming such evidence is  
23 admissible, it is not pertinent to the opinions offered by Mr. Daus.

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25  
26 <sup>3</sup> SCVWA ignores that vast strides made in the effectiveness of groundwater  
27 treatment systems since 1993, which could easily provide more efficient and  
28 effective treatment in a shorter period of time, thus rendering SCVWA's argument  
moot.

1        **B. THE BASIS FOR DAUS OPINION NO. 4 MEETS THE STANDARDS FOR**  
2        **ADMISSIBILITY**

3        In Opinion 4 Mr. Daus opines: “The groundwater containment remedy for  
4        the VOC plume in OU-3 and OU-4 was described in the FS and RAP and approved  
5        by the DTSC. To develop and implement this remedy, the groundwater plume was  
6        sufficiently delineated both laterally and vertically. Hagstrom Dcl. ¶1

7        Mr. Daus’ Opinion No. 4 is based upon data collected and analyzed from an  
8        array of groundwater wells that comprise the groundwater remedy approved by  
9        DTSC. The location, depth, operation and testing of this array of wells, all  
10       approved by DTSC, demonstrate that the VOC plume at the property has been  
11       sufficiently delineated both vertically and laterally to successfully implement the  
12       groundwater remedy. SCVWA misunderstands the importance and application of  
13       groundwater level measurements in determining groundwater flow direction. As  
14       explained by Mr. Daus, the impact of the pumping of wells, if relevant, would,  
15       would be seen in groundwater data.

16       **The groundwater levels measured at the Site will capture the**  
17       **influence of all pumping on the groundwater flow system, whether**  
18       **from on-Site or off-Site extraction wells.** Since drawdown is  
19       cumulative, any drawdown in groundwater elevations that is  
20       generated by pumping at Saugus 1 and Saugus 2 or any other off-Site  
21       well and extends far enough away from the pumping well is included  
22       in the measured water levels in monitoring wells. Contrary to Mr.  
23       Gee’s statement, **the influence of all pumping wells is inherently**  
24       **factored into the groundwater elevation data including the**  
25       **impacts from pumping from Saugus 1 and Saugus 2.** The  
26       groundwater elevations that I prepared using the September 2019 data  
27       reflect the impact of all pumping, whether on-Site or off-Site, on the  
28       groundwater elevations. Daus Dcl. ¶2 (Emphasis added)

25       As stated in the DTSC-approved groundwater monitoring program, the  
26       purpose of the ongoing groundwater monitoring program is to provide  
27       the information or data necessary to evaluate the effectiveness of the  
28       remedial actions in achieving the intended goals. **If groundwater**  
     **pumping from on-Site or off-Site extraction wells changes in the**

1 **future, groundwater elevation data and subsequent groundwater**  
2 **contour maps and analysis prepared using these data will reflect**  
3 **those changes.** If these future maps and analysis suggests that  
4 additional capture is needed, adjustments to the groundwater pumping  
5 scheme may be deemed necessary. Whether additional groundwater  
pumping is necessary is a data-driven, scientific analysis based on  
information obtained as part of the groundwater monitoring program.

6 Daus Dcl. ¶2. (Emphasis added).

7 Moreover, SCVWA's litigation driven argument that the remedial system is  
8 somehow flawed, belies that fact that SCVWA has, through joint technical  
9 meetings, been deeply involved in the development of the groundwater remedy  
10 since its inception. SCVWA engineers, hydrologists and executives have had the  
11 opportunity to and have voiced their opinions on the design and implementation of  
12 the remedy to DTSC, opinions that were considered, and some of which were  
13 adopted by DTSC. If the "pumping" of Saugus-1 and Saugus-2 were "**potentially**  
14 **significant**" (emphasis added), SCVWA had the opportunity to raise that issue is  
15 these joint technical sessions and it would have been considered.

16 That SCVWA does not now agree with Mr. Daus' data-based opinion does  
17 not make the opinion "flawed" or unreliable. The foundation of SCVWA's entire  
18 argument to exclude Mr. Daus' Opinion No. 4 is that he "did not consider the  
19 potentially significant influence of groundwater pumping." SCVWA would have  
20 the Court exclude Mr. Daus' opinion because there is a "potential" that Saugus-1  
21 and Saugus-2 might influence groundwater flow, a potential that would have been  
22 factored into the approved remedy if it was "significant". SCVWA's disagreement  
23 with Mr. Daus' Opinion No. 4 is not enough to exclude his testimony. *Kennedy v.*  
24 *Collagen Corp.*, 161 F.3d 1226, 1230, (9<sup>th</sup> Cir. 1998) *cert. den.* 526 U.S. 1099  
25 (stating that a court "should not exclude expert testimony simply because it  
26 disagrees with the conclusions of an expert"). Moreover, the methodology  
27 employed by Mr. Daus did consider SCVWA's pumping of its groundwater  
28 production wells.

1       **C. THE BASIS FOR DAUS OPINION NO. 5 MEETS THE STANDARDS FOR**  
2       **ADMISSIBILITY**

3       In Opinion 5 Mr. Daus opines that “Several important lines of evidence  
4 indicate that the groundwater extraction system is containing the VOC plume on-  
5 Site. These include the groundwater quality monitoring data, piezometric contour  
6 maps, groundwater elevation hydrographs, and chemographs. Each of these lines  
7 of evidence and the supporting data are described in [the detailed discussion of]  
8 this section.” Hagstrom Dcl. ¶1.

9       Mr. Daus’ Opinion No. 5 is, as was Opinion No. 4, based upon data  
10 collected and analyzed from an array of groundwater wells that comprise the  
11 groundwater remedy at the Whittaker property, a remedy approved by DTSC, after  
12 input by SCVWA’s technical staff and its executives. SCVWA’s contention that  
13 Daus Opinion No. 5 is “unreliable”, is based, in large part, on the same argument it  
14 makes to exclude Daus Opinion No. 4, which, as shown above, lacks factual  
15 foundation and legal support.

16       Contrary to SCVWA’s statements, Mr. Daus’ opinion is not inconsistent  
17 with the work of Dr. Panday and Dr. Amini (and even if it was, inconsistency is  
18 not a basis to exclude expert testimony). And even if it was, a difference of  
19 opinion is any a basis for exclusion.

20       The Model Update that Dr. Amini and Dr. Panday presented simulated  
21 particle tracks that were based on a numerical model that contained numerous  
22 assumptions regarding the groundwater flow system and was calibrated to 2018  
23 average groundwater elevation data. Particles were then released at the wells and  
24 traveled in reverse to show the modeled capture zone for each well. The model  
25 presented in the Model Update was prepared based on what was known and  
26 assumed at the time the model was prepared. Daus Dcl. ¶3.

27       Between 2018 and 2019, groundwater elevations continued to drop as  
28 pumping from the containment system continued and increased, providing new

1 information about the hydrogeologic conditions and how the aquifers respond to  
2 pumping. This new information could not have been incorporated in the Model  
3 Update presentation in February 2019 as it was not known at that time. Daus Decl.  
4 ¶3.

5 The groundwater contour maps and analysis prepared by Mr. Daus is based  
6 on the actual measured depth to groundwater data collected in September 2019,  
7 rather than a simulated forecast. Importantly, in Mr. Daus' opinion that the on-  
8 Site groundwater extraction system provides containment of the VOC plume is  
9 supported not only by the groundwater elevation data but also by the groundwater  
10 quality monitoring data. Daus Decl. ¶¶. 2 and 3.

### 11 III. CONCLUSION

12 SCVWA's implication that the simulated capture zones of the groundwater  
13 remedial system installed at the Whittaker property are not sufficiently wide to  
14 capture VOCs in the southwest corner of the Whittaker property is misplaced. The  
15 analysis by Mr. Daus, as set out in his expert opinions, confirms that the capture  
16 zone provided by all the extraction wells in the aggregate contain the VOC plume  
17 within the boundary of the Whittaker property.

18 That SCVWA disagrees with these opinions is not surprising and not a basis  
19 to exclude them.

20  
21 Dated: July 19, 2021

BASSI EDLIN HUIE & BLUM

22  
23  
24 By:

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Attorneys for Defendant and Third-Party  
Plaintiff WHITTAKER  
CORPORATION

**REPLY IN SUPPORT OF PLAINTIFF'S MIL #2 (DAUS)**

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1 **I. INTRODUCTION**

2 Whittaker attempts to rehabilitate Mr. Daus' opinion with a declaration that  
3 does not change his resume or his testimony. The fact remains that his first  
4 opinion lacks any legal standard and will be cumulative of DTSC and Whittaker  
5 percipient witness testimony with firsthand knowledge of Whittaker's onsite  
6 activities. His opinion is also irrelevant because this lawsuit is about SCV Water  
7 recovering its cost to continue to address Whittaker's contamination releases and  
8 not onsite soil cleanup activities.

9 Whittaker also attempts to rehabilitate Mr. Daus' testimony regarding  
10 pumping influences of Saugus 1 and 2 which he admits that hydrogeologists (like  
11 Mr. Daus) need to include in groundwater containment analysis, yet he failed to do  
12 so. Neither Whittaker nor Mr. Daus attempt to correct his testimony (for example  
13 through a deposition transcript errata notification), and rather conflate his  
14 testimony by stating that there are secondary influences of groundwater pumping  
15 that are inherent in groundwater elevation.

16 Finally, Mr. Daus distinguishes his work from his esteemed colleagues by  
17 suggesting that his analysis utilizes real data, data that was collected over a short  
18 time period and does not include contamination data analysis of the most heavily  
19 contaminated areas in the southwest region of the site and closest to SCV Water  
20 wells V- 201 and V-205.

21 **II. LEGAL ARGUMENT**

22 **A. Daus' Opinion 1 Regarding the DTSC's Satisfaction With**  
23 **Whittaker's Efforts Should Be Excluded as Unreliable, Not**  
24 **Probative, Cumulative, and a Waste of Time**

25 Daus' Opinion 1—that the DTSC is purportedly “satisfied” with site  
26 investigation and remedial measures implemented by Whittaker—is unreliable,  
27 unnecessary, and more prejudicial than probative.

28 First, Daus failed to articulate any professional standard for the alleged  
“DTSC Satisfaction”—nor could Daus set forth such a standard, as he lacks the

1 necessary qualifications to do so given that he has never worked for DTSC and has  
2 no expertise regarding “DTSC Satisfaction.” The Ninth Circuit has repeatedly  
3 upheld the exclusion of testimony by expert witnesses as to matters outside their  
4 expertise. *See, e.g., Alexander v. United States*, 63 F.3d 820, 822 (9th Cir. 1995)  
5 (district court properly excluded expert testimony regarding vessel charters where  
6 expert's qualifications were not “on point” with the issues testified to); *Mathes v.*  
7 *The Clipper Fleet*, 774 F.2d 980, 984 (9th Cir. 1985) (former deckhand's previous  
8 observation of transfers of items from one vessel to another did not qualify witness  
9 to testify regarding industry custom and practice for transferring items);  
10 *Higgenbottom v. Noreen*, 586 F.2d 719, 722 (9th Cir. 1978) (trial judge did not  
11 abuse discretion by disallowing testimony as to proper installation of fireplace unit,  
12 where expert had installed only four such fireplaces in thirteen years).

13 Moreover, Whittaker’s claim that Daus need not show any basis for his  
14 “DTSC Satisfaction” opinion aside from his general background is incorrect—an  
15 expert who cites his own experience/expertise rather than data should be excluded.  
16 “A witness who invokes ‘my expertise’ rather than analytic strategies widely used  
17 by specialists is not an expert as Rule 702 defines that term.” *Zenith Elecs. Corp.*  
18 *v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

19 Second, Daus’ first opinion is wholly unnecessary, and any arguable  
20 relevance or probative value is outweighed by the certainty that it will involve the  
21 needless presentation of cumulative evidence, and a waste of time. FRE 403. The  
22 testimony is not probative because Whittaker did not and is not actually  
23 implementing any action to remediate offsite contamination. *See* “Castaic Lake  
24 Water Agency (predecessor in interest to SCV Water) - Whittaker off-site  
25 Groundwater contamination” page of the DTSC Envirostor website.  
26 [https://www.envirostor.dtsc.ca.gov/public/profile\\_report?global\\_id=60000168](https://www.envirostor.dtsc.ca.gov/public/profile_report?global_id=60000168).  
27 SCV Water has been actively remediating the offsite groundwater since 2003. The  
28 subject of this lawsuit is whether Whittaker is responsible for paying SCV Water to

1 address the impacts of Whittaker's contamination on its off-site production wells,  
2 not whether DTSC consents to its cleanup of its onsite soil.

3 Moreover, there will already be testimony from at least two witnesses  
4 regarding the DTSC's "satisfaction" or lack thereof: Mr. Diaz (DTSC Project  
5 Manager for the Whittaker site) and Hassan Amini (Whittaker's project manager  
6 and Daus' colleague). In light of the testimony to be provided by the DTSC site  
7 mitigation managers who actually oversaw Whittaker's activities, any testimony by  
8 Daus regarding DTSC's oversight would not only be needlessly cumulative, but  
9 also less reliable than that of the percipient witness testimony on the issue.

10 **B. Daus' Opinion 4 Regarding OU-3 and OU-4 Delineation Should  
Be Excluded as Unreliable Under *Daubert***

11 Daus' Opinion 4 should also be excluded under *Daubert* principles. Where,  
12 as here, the expert himself admits that there is a serious flaw in his opinion because  
13 he failed to consider the impact of SCV Water's groundwater production wells  
14 with respect to his groundwater flow opinion, it establishes more than just a fallacy  
15 that goes to the "weight of the evidence." In this case, there is simply "too great an  
16 analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v.*  
17 *Joiner*, 522 U.S. 136, 146 (1997).

18 Daus admits that to render a reliable opinion, a hydrogeologist must look at  
19 all the relevant data relating to groundwater flow, including groundwater wells: "I  
20 think you have to look at those things. **You have to look at anything that would**  
21 **influence the flow**, whether it's a -- whether it's a recharge source, for example, if  
22 it's a lake or a river or a discharge point. If it were also a river **or a groundwater**  
23 **pumping well** or any one of a number of things, a swamp, so **you have to look at**  
24 **the -- kind of the full picture of information** and consider geologic information."  
25 Gee Decl. ISO Mtns. Ex. K at 32:4-33:7 (Daus Depo. Excerpts).

26 Daus also admitted—after repeated attempts to evade the question—that he  
27 nonetheless *disregarded* all data regarding the Saugus 1 and 2 groundwater  
28 production wells:

1 Q Let me ask a simple question. Did you consider Saugus-1 and  
2 Saugus-2 operational when you conducted your evaluation?

3 A Well, I knew Saugus-1 and 2 were out on -- you know, to the north  
4 and to the east -- or west of the site, but my evaluation was of the data  
5 that shows containment -- or of the groundwater elevation data, and  
6 that's what I considered.

7 Q Okay. So the answer is the influences from the Saugus-1 and  
8 Saugus-2 operation was not considered in your report?

9 A Whatever was happening at the site, whatever has been going on at  
10 the site, under this containment system that they have operating at the  
11 site is what I considered. . .

12 Q Okay. So my question is . . . that you did for your containment  
13 evaluation, the base conditions involved Saugus-1 and Saugus-2  
14 operating?

15 A No.

16 Gee Decl. ISO Mtns. Ex. K at 123:8-124:6 (Daus Depo. Excerpts).

17 Thus, by his own admission, Daus concedes that he failed to consider the  
18 very data that "you have to look at" as a hydrogeologist, and his opinion is  
19 therefore unreliable under his own stated methodology.

20 Whittaker attempts to modify Mr. Daus' testimony by providing additional  
21 testimony regarding the long term impacts of pumping that will have groundwater  
22 elevation influences. Mr. Daus did not indicate that he changed his testimony  
23 (note that Whittaker counsel did not cite to any changes to Mr. Daus' testimony  
24 errata sheet), but rather attempts to conflate his testimony with secondary impacts  
25 of offsite well pumping.

26 **C. Daus' Opinion 5 That the Groundwater Remedy Is Providing  
27 VOC "Containment" Should Also Be Excluded As Unreliable**

28 Finally, Daus' Opinion 5 is likewise unreliable and should be excluded. He  
opines that VOC contamination has been contained on the Whittaker site, based  
upon his opinion that groundwater does not flow from the Whittaker site toward  
Saugus 1 and 2. However, in light of Daus' admitted failure to give any  
consideration to the Saugus 1 and 2 groundwater pumping wells, his analysis is  
unreliable for the same reasons set forth above in Part II.B.

1           Additionally, Daus' analysis is contradicted by the particle tracking model,  
2 as explained by experts Amini and Sorab. Their model demonstrates that  
3 Whittaker's extraction wells do not reach the most heavily contaminated  
4 groundwater in the southwest corner of the site. Gee Decl. ISO Mtns. Ex. X at 53  
5 (Powerpoint Presentation). That is where some of the highest concentrations of  
6 TCE contamination are found. See Gee Decl. ISO Mtns. Ex. C at 31 (Stanin  
7 Expert Report).

8           Mr. Daus attempts to diminish the work of his esteemed colleagues.  
9 However, Mr. Daus himself admits that the onsite groundwater extraction program  
10 began in 2018 (and was fully implemented in 2019, the year he generated his  
11 contour maps) and groundwater projects typically take 30 years. As discussed  
12 above, there is simply too little data to determine if Whittaker's onsite extraction  
13 program will be effective.

### 14   **III. CONCLUSION**

15           For the above stated reasons, Mr. Daus' opinions 1, 4 and 5 should be  
16 excluded.

17  
18   Date: July 23, 2021

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